UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Consumer Protection
Division of Marketing Practices

November 14, 2011

Filed Electronically

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation, Federal Trade Commission, CG Docket No. 11 - 50, Dish Network, LLC Petition for Declaratory Ruling Concerning the Telephone Consumer Protection Act

Dear Ms. Dortch:

The undersigned hereby provides notice as required by Section 1.1206 of the Rules of the Federal Communications Commission ("FCC" or "Commission"), 47 CFR § 1.1206. On November 10, 2011, Federal Trade Commission ("FTC") employees Charles Harwood, Deputy Director of the Bureau of Consumer Protection, Lois Greisman, Associate Director of the Division of Marketing Practices, Robert Anguizola, Assistant Director Marketing Practices, and Russell Deitch, staff attorney met with Angela E. Giancarlo, Chief of Staff and Senior Legal Advisor to Commissioner McDowell.

FTC staff discussed the importance of the Telephone Consumer Protection Act ("TCPA") and its implementing regulations, and the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act") and its implementing regulations, the Telemarketing Sales Rule ("TSR"). These laws and regulations advance the substantial government interest of protecting individuals' privacy in their homes, and protecting consumers against the risk of abusive telephone practices. FTC staff also noted that consumers have sought these protections in massive numbers – more than 200 million telephone numbers have been placed on the National Do Not Call Registry.

FTC staff also stated that the TCPA and its accompanying regulations form a statutory cause of action whose elements should be accorded their plain meaning. For example, the FCC should use the plain meaning of the term "on behalf of" in the TCPA which is "in the interest of," "as a representative of," or "for the benefit of." This interpretation appropriately places liability on a seller who benefits from the actions of others, including but not limited to, telemarketers and dealers.

The FTC staff also pointed out that all of the elements of a cause of action are already set forth in the TCPA and its regulations and that the FCC need not read agency principles into the statute or regulations. FTC staff noted that the regulations include a safe harbor, in that those who make telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable if they meet certain specified criteria set forth in the regulations. 47 C.F.R. § 64.1200(c)(2). By providing a safe harbor, the statute and its regulations strike a fair balance: Sellers initially are responsible for Do Not Call violations, but can avoid liability by meeting the terms of the well-defined safe harbor.

FTC staff further stated that the TCPA, its related regulations and common business practices strike a balance between protecting consumers from pre-recorded calls and imposing seller liability. The TCPA prohibits any person from initiating pre-recorded calls to residential phone lines without the express prior consent of the consumer. 47 U.S.C. § 227(b)(1)(B). Sellers may be held liable under the TCPA for initiating pre-recorded calls.[1] Sellers are also liable for pre-recorded calls placed by others when the calls are made on their behalf. Since 1995, the FCC has taken the position that its "rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations."[2] Thus, if a marketer placed pre-recorded calls on behalf of a seller, both the marketer and the seller are liable. At the same time, however, sellers can avoid liability by having an existing business relationship with the consumer, having prior express consent of the consumer, or entering into an indemnification agreement with the telemarketer to reimburse the seller for any penalties arising from violations.

At the meeting as well as in its earlier filings, FTC staff has consistently raised specific concerns about the problems that likely would arise from importing agency or apparent agency law into the TCPA. These include:

- It would make litigation more difficult, expensive and time consuming for the States and the FCC, and perhaps create particular hardships for private plaintiffs;
- Without clear and detailed guidance from the FCC, it leaves open the question as to what factors establish agency or apparent agency;
- It gives sellers a potential roadmap to avoid liability;
- Companies could outsource their marketing to others, and structure contractual relationships in such a way as to avoid a court finding that their dealers are agents or apparent agents;
- Sellers could hire telemarketers that are judgment proof or that go out of business when sued, which leaves no effective remedy or deterrent impact;
- Sellers may hire telemarketers who spoof or hide their identities, which makes

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[1]Both sellers and telemarketers can initiate calls. For example, a seller making calls through its employees initiates calls. Also, a seller can initiate a call by providing financial incentives, directly or indirectly, to a telemarketer or dealer, who physically places the call.

[2] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order 10 FCC Rcd 12391, 12397 ¶ 13 (1995).

enforcement difficult or impossible;

- Suing one dealer at a time could result in a whack-a-mole problem when new dealers spring up in their place and engage in the same violations;

- Rules designed to allow consumers to make entity-specific Do Not Call requests could be rendered ineffective; and

- In a large network of marketers, it can be difficult and inefficient for the government to identify which marketers are violating the law.

The FTC staff further stated that the FCC should adopt the plain meaning of the law and regulations. If, however, the FCC is going to incorporate agency principles into the TCPA, the FTC staff urges it be done in a way that (1) advances the substantial privacy and consumer protection interests at issue, (2) takes into account the nature of telemarketing and the ways that violations occur, and (3) provides guidance for the courts.

FTC staff noted that a rigid application of common law definitions of agency law such as control, direction, authority, manifestation, or ratification likely would pose enforcement challenges, particularly given the numerous marketing techniques in today's global marketplace. Courts have supported an approach that does not involve adopting agency law wholesale. For example in *Goodman v. Federal Trade Commission,* 244 F.2d 584, 591 (9th Cir. 1957), the court said that "in dealing with a regulatory statute aimed to achieve a greater societal control though specialized agencies, the courts should disregard common-law definitions. Rather, should they envisage the legislation as a whole, the evils it sought to eradicate or the control which it aimed to achieve, and interpret the words with these objectives in view." *See also*, *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation*, 456 U.S. 556, 573 (1982) (declining to adopt a traditional ratification approach since it would allow an entity to avoid liability by remaining ignorant of its agents' conduct, and would encourage the entity to do as little as possible to overseas its agents).

FTC staff does recommend that the FCC provide guidance to the courts about the nature and scope of seller liability under the TCPA if the FCC does not adopt the plain meaning of certain operative terms. The FTC set forth six factors its Reply comment that could be used as guidance for courts.[3] In additional to the factors identified in its Reply, FTC staff notes that another factor would consist of whether the telemarketer, dealer, or other person operating on the seller's behalf uses the seller's trademark. FTC staff notes that there may be cases in which a seller is liable for calls placed by another entity even in the absence of one or more of these

[3]The factors are whether: (1) seller enters into contracts directly with consumers who choose to purchase the seller's goods or services in response to telemarketing; (2) a seller provides its services directly to those consumers; (3) a seller collects money for those services from its consumers; (4) a seller receives continuing revenue from such consumers; (5) a seller compensates those who market its goods or services; (6) the seller is in a position to monitor its telemarketers. Reply Comment of the Federal Trade Commission, CG Docket No. 11 - 50.

factors, and that other factors may be applicable.

Finally, the FTC staff stated that the FCC should not adopt the factors set forth in Dish's Response comment of November 3, 2011 which Dish drew from the case of *Community for Creative Non-Violence v. Reid*, 440 U.S. 730 (1989). The case deals with the issue of whether an artist was an employee acting within the scope of his employment under the Copyright Act of 1976. The Copyright Act uses the term "employee"which is not found in the TCPA or its implementing regulations. Instead, the TCPA and its implementing regulations use broader terms such as "on behalf of". The factors to determine the nature and scope of two completely different terms – employees and on behalf of – should be different.

Additionally, the legal standard for determining an employee relationship is much higher than that for an agency relationship, and there is no reason or basis to adopt the higher standard. in the telemarketing context or in interpreting the scope of seller liability under the TCPA. Telemarketing often involves outsourcing to marketers who are not employees, and adopting an employee standard would create a huge loop hole in the law where sellers could easily avoid liability. Sellers could simply hire entities to market their product, grant authority to use their trademark or trade name, set the prices and terms for the sale, pay the marketers commissions for marketing or sales, enter into contracts directly with consumers, and benefit from the sale year after year, but at the same time argue that the entities are not employees since they did not control the manner and means of the marketing (*i.e.,* sellers did not supply the script or mandate that the marketer use telemarketing). Allowing sellers to escape liability under this scenario would give them a green light to benefit from unlawful telemarketing, where they undoubtedly have a close relationship with the telemarketer, without bearing any costs for violations. Instead, innocent consumers would bear the costs of violations, and lose their fundamental right to be left alone even though they did everything possible to protect themselves by signing up for the National Do Not Call Registry. This outcome is not consistent with the privacy and consumer protection goals of the TCPA, or a fair balancing of the interests of sellers and consumers.

Regards,

s/Russell Deitch
Russell Deitch
Attorney, Division of Marketing Practices

cc: Angela E. Giancarlo